APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RANGA RAU (PLAINTIFF), APPELLANT,

v.

BHAVAYAMMI (DEFENDANT), RESPONDENT.*

1894. April 3, 4.

Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of 1879, s. 39—Whether secondary evidence of a lost document can be admitted on payment of penalty.

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person.

In the case of a lost document no penalty can be levied and secondary evidence admitted, for s. 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming.

Kopasan v. *Shamu* (1) followed.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 39 of 1890.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The plaintiff preferred this appeal.

Rama Rau and *Bhashyam Ayyangar* for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—Appellant is the zamindar of Bobbili, and respondent's late husband, Sitaramaswami, was the sister's son of appellant's paternal grandfather. The property in litigation is the proprietary estate called Chilikala Jagannathapuram, and it has admittedly been in the possession first of Sitaramaswami and after his death in that of his widow, the respondent, from February 1862. In that year, appellant's paternal grandfather transferred the estate for valuable consideration to respondent's husband under the patta VI. Appellant brought the present suit to eject the respondent from that estate and to recover possession of it with *mesne* profits for three years, 1887 to 1889. Appellant's mother, Chellayammi, was the daughter of Gopayammi,

* Appeal No. 58 of 1893.

(1) I.L.R., 7 Mad., 440.

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who was the sister of appellant's paternal grandfather and wife of one Rajagopala Rao. The estate in dispute was first granted to Rajagopala Rao in 1848, and, on his death in 1856, his widow and the grantor applied to the Collector for its being registered in the name of the latter. The Collector accordingly registered the estate in the name of the grantor who, after continuing in possession for six years, transferred it for value under the patta VI to Sitaramaswami as stated above. The ground on which the appellant rests his claim is that the first grant to his maternal grandfather Rajagopala Rao was absolute and unconditional, that it is not true as stated by his paternal grandfather and maternal grandmother in 1856 (exhibits XVI and XVII), that the grant was subject to the condition that the estate was to revert to the grantor in the event of the grantee dying without male issue, and that the allegation made to that effect in 1856 was collusive and made in view to defraud the reversioner. He alleged that his maternal grandmother Gopayammi died in March 1872, that his mother died in May 1887, that he was adopted in February 1871 and attained his majority in 1881. It will thus be seen that appellant claims the estate as the daughter's son by adoption of Rajagopala Rao the grantee of 1848. The respondent resisted the claim on the ground that the grant to Rajagopala Rao was not absolute but conditional, that the estate reverted to the grantor on Rajagopal's death without male issue, that the transfer of 1862 to her husband was valid, and that the appellant's claim was barred by limitation. The Judge held that the grant of 1848 was conditional, and that, although the claim was not barred by limitation, the appellant was estopped from asserting that his paternal grandfather was not competent to transfer the estate under patta VI, and that the transfer was valid. The Judge accordingly dismissed the suit with costs. Hence this appeal.

We are unable to agree with the Judge that the doctrine of estoppel applies to this case. It cannot apply when the person making the representation was not the person as whose representative the plaintiff claims the property, and in the case before us the appellant claims the estate in the right of his maternal grandfather, and not of his paternal grandfather, who was the person that declared that he was competent to transfer it under the patta VI. This limitation of the doctrine of estoppel is mentioned not only in the case referred to by the Judge (*Syed Ameer Ali* v. *Syed*

Ali(1)), but also by the Privy Council in *Syed Nurul Hossein* v. *Theosahai*(2). As to the question of limitation, the decision must depend on the further question whether the retransfer to the appellant's paternal grandfather was the result of collusion between him and his sister Gopayammi. Act XIV of 1859 was the law of limitation in force until April 1873, and if the appellant's right were barred by that enactment, it could not be revived either by Act IX of 1871 or by Act XV of 1877, under which the death of the female on which the reversion becomes an estate vested in possession is the event from which time begins to run against the right of the reversioner to sue. Assuming that there was no collusion between Appellant's paternal grandfather and maternal grandmother, and that the retransfer to the grantor was *bonâ fide*, the resumption by the grantor in 1856 would be an act done in enforcement of an adverse title against both the widow and the reversioner, and not merely an act done under an alienation by the widow. The suit would then clearly be barred by Act XIV of 1859. It was also so held in *Tarini Charan Ganguli* v. *John Watson*(3) and *Aumirtolall Bose* v. *Rajoneekant Mitter*(4).

The real question then for determination is whether the collusion alleged between Gopayammi and appellant's grandfather is proved. The *onus* of proving the fraud is clearly upon the appellant, and we are of opinion that his oral evidence is not reliable. It is true that his first three witnesses depose to a conversation between appellant's grandfather and maternal grandmother in which it was contrived that they should falsely represent to the Collector that the grant of 1848 was conditional. But we are unable to attach weight to their evidence. In the first place they are all *Ghosha* ladies in a position of dependance on the appellant, and in receipt of maintenance from him. They say they never mentioned what they then heard to any one before this suit, and it is improbable that they should be able to remember, at this distance of time, the particulars to which they depose.

We are further of opinion that the Judge is right in refusing to admit in evidence an alleged copy of the grant of 1848, on the ground that the original was not sufficiently stamped under Regulation 13 of 1816 which was in force in 1848. The copy

(1) 5 W.R. (C.R.) 289.
(2) L.R., 19 I.A., 221.
(3) 3 B.L.R., 437.
(4) L.R., 2 I.A., 113.

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shows that the stamp used was of Rs. 8 value, whilst it ought to have been of Rs. 50 value. The value of the property is not mentioned in the copy. The Judge was, however, in our opinion, justified in ascertaining the value by reference to exhibits I and II, and the value of the stamp which should have been used must be calculated with reference to that value. We also agree with him that the copy should not be admitted on payment of penalty, for the provision of the Stamp Act regarding payment of penalty (section 39 of Act I of 1879) prescribes that such payment shall be endorsed on the document, and presupposes that the document is forthcoming. It was also held in *Kopasan* v. *Shamu*(1) that in the case of a lost document no penalty can be levied and secondary evidence admitted. As regards the contention that the *onus* of proving that the grant was conditional rests on the defendant, we are of opinion that the contention cannot be supported. In the written statement it was denied that any *patta* in writing was granted in 1848, and that there was any grant in April of that year at all, but it was alleged that there was a conditional grant in August 1848. Under these circumstances, we think it is incumbent on the plaintiffs to show that there was an unconditional grant in writing, this being part of his case. As was observed in *Poslin Beharee* v. *Watson and Company*(2) the averment in the written statement is not in the nature of a plea of confession and avoidance so as to shift the burden on to the defendant. Even assuming the *onus* of proof to have been on the defendant, the Judge's finding that the grant of 1848 was conditional is supported by several of defendant's documents XIV, XVI and XVII, the first of which contains an admission by the appellant's mother in 1874 that the original grant was conditional. The appeal therefore fails and we dismiss it with costs.

(1) I.L.R., 7 Mad., 440.

(2) 9 W.R., 190.